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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Royal Hawaiian Movers, Inc.

File: B-288653

Date: October 31, 2001

Marjorie A. Stender, Esq., Luce, Forward, Hamilton & Scripps, for the protester.
Elizabeth Rivera, Esq., and Lori W.L. Chang, Esq., Department of the Navy, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Notwithstanding a provision in a request for proposals that price revisions could only be made during a reverse auction, the agency reasonably determined to request revised price proposals after the end of the auction, in response to an agency-level protest, where the solicitation was ambiguous concerning when the auction would end and the agency reasonably believed that offerors may have been misled.

DECISION

Royal Hawaiian Movers, Inc. protests the agency's decision to obtain revised proposals under request for proposals (RFP) No. N00604-01-R-A014, issued by the Department of the Navy for drayage services in Hawaii. Royal Hawaiian contends that it was entitled to award on the basis of its low price under a reverse auction conducted by the agency prior to the request for revised proposals.

We deny the protest.

The RFP, issued as a total small business set-aside, provided for the award of fixed-price, requirements contract to perform drayage services (movement of containers) between points on Oahu, Hawaii for a base year with 4 option years. Offerors were informed that award would be made to the offeror submitting the lowest-priced, technically acceptable offer.

The RFP provided for a reverse auction after the submission of initial price proposals. Detailed instructions, including a "Bidder's Guide," were provided for the conduct of the reverse auction. RFP amend. 5, at 2-21. Among other things, offerors

were informed that price revisions could be made only during the reverse auction, which would last for 60 minutes. The RFP also stated that the receipt of a revised offer within the last 5 minutes of the auction would extend the auction for an additional 5 minutes. Id. After an extension of the auction period, the auction would continue until either no revised offer was received during the last 5 minutes of the auction as extended or all the available extensions were exhausted. Agency Report at 5. The RFP stated that there would not be more than 50 extensions available and that the auction would be conducted “from 9:00 AM through [no later than] 2:00 PM Hawaii Standard Time (HST).”¹ RFP amend. No. 5, at 2. Notwithstanding that the RFP stated that the auction would end at 2 p.m., as the agency noted in its report, if all 50 extensions were employed, the auction would actually not end until 2:10 p.m. Offerors were also informed that the conduct of the reverse auction constituted discussions with the offerors, and that the end of the last 5-minute period during which revised offers were permitted was considered to be the close of the auction. Id. at 2-3.

The Navy received five proposals in response to the RFP. Only four offerors, including Royal Hawaiian and Pacific Express, attended the required training for the reverse auction and participated in the auction, however. Agency Report at 4. The reverse auction began at the appointed time with a message to the four offerors that the auction had begun. Agency Report, Tab 8, Reverse Auction Messages and Prices, at 14.

Offers and revised offers were received through the first hour, and the first extension was triggered by a revised offer made at 9:55:41 a.m. (within the then last 5 minutes of the auction, that is, within the 9:55 to 10:00 a.m. period), which extended the auction to 10:05 a.m. As each extension was triggered, the offerors received a message that the auction had been extended by 5 minutes. See, e.g., id. at 12. Also, as the auction progressed and was extended, offerors were periodically informed of the number of extensions remaining.

In the final minutes prior to 2 p.m., several developments of relevance here occurred. At 1:48:21 p.m. (prior to which event the auction was scheduled to end at 1:50 p.m.), the agency received a revised offer that extended the auction to 1:55 p.m. After the receipt of that offer, offerors were informed that there were three extensions remaining. At 1:52:29 p.m., the Navy received a revised offer from Pacific Express, which extended the auction period to 2:00 p.m. At 1:55:21 p.m., the Navy received another revised offer from Pacific Express, which extended the auction to 2:05 p.m. At 1:56:00 p.m., offerors were informed that one extension remained. At 2:00:50 p.m. (that is, within the final 5 minutes of the extended auction), the Navy received a revised offer from Royal Hawaiian that triggered the last extension, thus extending the auction to 2:10 p.m. In the last 5 minutes prior to 2:10 p.m., the Navy received a

¹ All references in this decision to time are to HST.

revised offer from Pacific Express at 2:08:39 p.m., a revised offer from from Royal Hawaiian at 2:09:49 p.m., and a revised offer from another offeror at 2:10:00 p.m. Id. at 1-2.

The Navy found that when the auction concluded at 2:10 p.m., Royal Hawaiian had submitted the overall lowest-priced offer. Agency Report at 6. Pacific Express objected to the agency that its offer at 1:52 p.m. was the lowest-priced overall, if offers after 2 p.m. were not considered.² Pacific Express then filed an agency-level protest, arguing that offers received after 2 p.m. should be disregarded because the RFP stated that the auction would end no later than 2 p.m.

In response, the Navy determined that the RFP contained an “anomaly . . . that needed to be fixed.” Agency Report at 6. That is, the RFP stated that the auction would end at 2 p.m., but provided for extensions that, if triggered, would extend the auction to 2:10 p.m. Accordingly, the Navy amended the RFP to request “final proposal revisions” from the four offerors that competed in the reverse auction. RFP amend. No. 7, at 2.

Royal Hawaiian timely protested amendment No. 7 (the Navy’s request for “final proposal revisions”) complaining that reopening the competition after the reverse auction was not required to ensure fair competition.³ Protest at 4. Specifically, Royal Hawaiian asserts that there is no evidence that any offeror was misled by the solicitation language and that, in fact, given the messages sent during the auction all offerors knew that the auction would continue past 2 p.m. Protester’s Comments at 2. In this regard, Royal Hawaiian notes that Pacific Express, which filed the agency-level protest, submitted an offer after 2 p.m. Finally, Royal Hawaiian complains that reopening the competition “results in a fundamental unfairness to Royal [Hawaiian], who is now placed in the position of bidding against itself.” Protest at 4.

The Navy responds that reopening the competition was necessary because the RFP contained an ambiguity that was potentially misleading to offerors. In this regard, the Navy notes that Royal Hawaiian and Pacific Express had different understandings of the rules governing the auction. In the agency’s view, the solicitation ambiguity caused “the procurement process [to be] inherently unfair, as

² The record confirms that Pacific Express had submitted the low-priced offer as of 2 p.m.

³ Pacific Express also protested to our Office the issuance of amendment No. 7 and the Navy’s decision to request “final proposal revisions.” We dismissed Pacific Express’s protest as untimely, in response to the Navy’s request, because Pacific Express had not filed its protest within 10 calendar days of initial adverse agency action on its agency-level protest.

offerors could not compete fairly with each other.” The Navy contends that, under the unique circumstances of a reverse auction (wherein offerors agree to full disclosure of offered prices), requesting “final proposal revisions” was an appropriate means of remedying the solicitation ambiguity and placed all offerors on an equal footing. Agency Report at 9.

An agency has broad discretion in a negotiated procurement to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Pacific Island Movers, B-287643.2, July 19, 2001, 2001 CPD ¶ 126 at 3. Where an agency has reasonable concerns that there were errors in a procurement, the agency may take corrective action, even if it is not certain that a protest of the procurement would be sustained. Main Bldg. Maint., Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. We will not object to the specific proposed corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Id.

In this case, we cannot find unreasonable the agency’s concern that offerors may have been misled to their detriment as to when the auction would conclude. The fact is that the RFP was patently ambiguous, given that the solicitation stated that the auction would end no later than 2 p.m. but provided for extensions, which if all 50 were used, would extend the auction past 2 p.m. The circumstances of this case, in our view, highlight the importance of having unambiguous ground rules in reverse auctions.⁴ Here, Pacific Express and Royal Hawaiian apparently interpreted the solicitation differently, each believing that it was the low-priced offeror at the end of the auction (that is, either 2 p.m. or 2:10 p.m., as argued by the respective firms). We recognize, as argued by Royal Hawaiian, that Pacific Express submitted a revised offer at 2:08 p.m., but we are not willing to conclude that this meant that Pacific Express understood prior to 2 p.m. that the auction would continue past 2 p.m. Rather, it is reasonable to believe, as the Navy does, that Pacific Express was surprised that the auction was continuing; under the time pressure of a reverse auction, even a firm believing it was improper for the auction to continue would be understandably reluctant to refrain from continuing to participate. We also note that another competing offeror did not submit a revised offer after 2 p.m., which suggests the possibility that that firm may have been misled by the RFP impropriety.

We do not agree with Royal Hawaiian that the solicitation impropriety was corrected during the auction when offerors were informed that there were remaining extensions, which, if triggered, would extend the auction beyond 2 p.m. Until 2 p.m., an offeror could not know that the agency would not close the auction at 2 p.m., as was plainly provided for by the RFP. That is, Pacific Express could reasonably

⁴ This decision does not address the more general question of the propriety of reverse auctions, since that is not at issue in the protest.

believe that at 2 p.m. the Navy would close the auction, despite the fact that there were remaining extensions that had not yet been triggered.

We are mindful of the harm that may occur to the integrity of the procurement process when the ground rules for the conduct of a procurement, or in this case, the reverse auction, are changed after offerors have submitted their proposals on the basis of what they believed were the rules. It is for this reason that we have found that a competition should not be reopened unless there is a reasonable basis to believe that an impropriety in the procurement process may have prevented offerors from competing on an equal basis. See, e.g., Hawaii Int'l Movers, Inc., B-248131, Aug. 3, 1992, 92-2 CPD ¶ 67 at 6. Here, the agency reasonably believed that offerors may have formulated differing auction strategies based upon different understandings as to when the auction would end. Given this concern, the Navy reasonably concluded that it needed to take corrective action to ensure that offerors were competing on an equal basis.

We also find that obtaining revised price proposals from the offerors was appropriate corrective action to correct the solicitation impropriety. Once the agency determined after the auction that a solicitation impropriety may have prevented offerors from competing on an equal basis, obtaining revised price proposals placed all offerors in an equal competitive position. See Pacific Island Movers, supra, at 4 (requesting proposal revisions to remedy an inept reverse auction was appropriate corrective action).

The protest is denied.

Anthony H. Gamboa
General Counsel